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ELVIS MOODY, PRESIDENT FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
JEM BROADCASTING CO., INC.

216 NORTH MAIN STREET

BENTONVILLE, ARKANSAS 72712

JULY 14, 1994

OFFICE OF THE SECRETARY
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RE: GC DOCKET NO.92-52

DEAR MR. CATON:

PLEASE FIND ENCLOSED AN ORIGINAL AND NINE COPIES OF
COMMENTS IN THE ABOVE REFERENCED DOCKET. AN ADDITIONAL COPY
HAS BEEN FILED WITH THE OFFICE OF THE GENERAL COUNSEL, ROOM
610, 1919 M STREET, WASHINGTON, D.C. 20554.

SHOULD THERE BE ANY QUESTIONS IN CONNECTION WITH THE
ENCLOSED, PLEASE CONTACT ME AT 501-273-9039 OR AT THE ADDRESS
ABOVE.

YOURS TRULY,


ELVIS MOODY

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

IN THE MATTER OF)

GC DOCKET NO. 92-52)

REEXAMINATION OF THE POLICY)

STATEMENT OF COMPARATIVE)

BROADCAST HEARINGS)

RM-7739)

RM-7740)

RM-7741)

ENCLOSED ARE THE COMMENTS OF JEM BROADCASTING COMPANY,
INCORPORATED, THE LICENSEE OF KJEM AM, BENTONVILLE/BELLA
VISTA, ARKANSAS, AND APPLICANT FOR CHANNEL 239A AT
BENTONVILLE, ARKANSAS.

IN THESE COMMENTS JEM BROADCASTING WILL ADDRESS THE
FOLLOWING:

- 1) SUGGESTIONS ON REVISING THE COMPARATIVE PROCESS
- 2) HOW THE COMMISSION CAN COMPLY WITH THE COURT OF
APPEALS RULING ON BECHTEL AND STILL AWARD LICENSES THAT WILL
SERVE IN THE PUBLIC INTEREST.
- 3) THE IMPACT OF BECHTEL ON OTHER ITEMS USED PREVIOUSLY
IN COMPARATIVE CASES TO ENHANCE INTEGRATION.
- 4) ADDITIONAL CRITERIA THAT SHOULD BE ESTABLISHED TO
SIMPLIFY THE CONCLUSION OF COMPARTIVE CASES.

REVISION OF THE COMPARATIVE PROCESS

TO MEET THE COURT OF APPEALS RESTRICTIONS IN BECHTEL, AND STILL AWARD LICENSES THAT WILL SERVE IN THE PUBLIC INTEREST REQUIRES THE COMMISSION TO ESTABLISH A CLEAR AND DEFENDABLE METHOD OF DECIDING COMPARATIVE CASES THAT WILL RESULT IN THE BEST POSSIBLE SERVICE TO THE COMMUNITY. TO DO THIS, THE COMMISSION SHOULD ADDRESS THE ENTIRE COMPARATIVE PROCESS. JEM BROADCASTING COMPANY SUGGESTS A THREE STEP PROCESS.

STEP ONE. UPON THE CLOSING OF THE FILING WINDOW OR PERIOD FOR ANY APPLICATION THE COMMISSION SHOULD DETERMINE OF THOSE APPLICATIONS TENDERED WHICH MEET THE THRESHOLD OF ACCEPTABILITY:

- A) THAT THE APPLICANT IS LEGALLY QUALIFIED
- B) THAT THERE ARE NO RESTRICTIONS THAT WOULD PREVENT THE APPLICANT FROM GAINING A GRANT OF THE APPLICATION IF THERE WERE NO OTHER APPLICANTS.

STEP TWO. ALL APPLICANTS THAT MEET THE THRESHOLD OF ACCEPTABILITY SHOULD BE THEN SUBJECTED TO AN IMMEDIATE PAPER HEARING OF THE APPLICANT ITSELF, AND NOT THE ENGINEERING SECTION. A SIMPLE POINT SYSTEM SHOULD BE ESTABLISHED TO GRADE THE APPLICANTS FOR COMPARATIVE PURPOSES. UNDER CURRENT RULES A SUCCESSFUL APPLICANT MAY APPLY FOR MODIFICATION OF THE ENGINEERING SECTION OF AN APPLICATION, SO IN REALITY THERE IS NO BENEFIT OR REAL REASON TO SPEND TIME AND EFFORT REVIEWING THE ENGINEERING PORTIONS OF ALL APPLICANTS.

IF THE SUCCESSFUL APPLICANT WERE SELECTED THEN GIVEN A PERIOD OF TIME TO SUBMIT THE ENGINEERING SECTION, THE COMMISSION STAFF WOULD ONLY HAVE TO REVIEW A SMALL PORTION OF THE ENGINEERING APPLICATIONS IT NOW DOES. IT WOULD BE BETTER TO SELECT THE APPLICANT FOR THE FACILITY THEN REQUIRE THE ENGINEERING APPLICATION TO BE SUBMITTED.

STEP THREE. AFTER THE PAPER HEARING A DETAILED GRADING OF EACH APPLICANT SHOWING THE COMPARATIVE STRENGTHS AND SHOULD BE SUBMITTED TO EACH APPLICANT. AT THAT POINT A THIRTY DAY SETTLEMENT PERIOD WOULD BE TRIGGERED ALLOWING APPLICANTS TO SETTLE IF POSSIBLE WITH CLEARLY DEFINED GUIDELINES THAT LIMIT SETTLEMENTS TO ACTUAL EXPENSES. AFTER THE THIRTY DAY SETTLEMENT PERIOD THERE WOULD BE NO ALLOWED SETTLEMENTS. AT THAT POINT A HEARING WOULD BE SET WITH EACH APPLICANT FREE TO CHALLENGE THE GRADING OF THEIR OR ANY OTHER APPLICATION. BY PREVENTING ANY SETTLEMENTS AFTER BEGINNING THE HEARING PROCESS, ONLY TRULY SERIOUS APPLICANTS WOULD GO TO THIS STAGE, FURTHER CUTTING DOWN ON THE NUMBER OF HEARINGS AS WELL AS THE NUMBER OF APPLICANTS IN THEM.

THIS THREE STEP PROCESS WOULD GREATLY REDUCE THE NUMBER OF APPLICATIONS FILED SIMPLY AS SPECULATION, TO BLOCK ANOTHER APPLICANT OR SEEKING A SETTLEMENT. BY ACCEPTING THE APPLICATIONS, THEN GRADING EACH APPLICANT BEFORE THE LENGTHLY PROCESS OF PETITIONS TO DENY, OR SEEKING ADDITIONAL ISSUES BY EACH APPLICANT THE COMMISSION COULD GREATLY REDUCE THE TIME, EXPENSE AND PAPERWORK INVOLVED IN ALMOST EVERY COMPARATIVE CASE.

THE ABILITY OF THE APPLICANT TO ATTACK THEIR OPPONENTS WOULD STILL BE AVAILABLE, BUT IN THE ACTUAL HEARING AFTER ANY PERIOD FOR SETTLEMENTS HAD PASSED. THE SUCCESSFUL APPLICANT WOULD THEN HAVE A PERIOD OF THIRTY DAYS WITH NO EXCEPTIONS TO SUBMIT AN ACCEPTABLE ENGINEERING SECTION. THIS WOULD REDUCE THE NUMBER OF ENGINEERING APPLICATIONS THE COMMISSION MUST REVIEW, WHEN THE OUTCOME OF THE PROCESS IS ALMOST ALWAYS BASED ON NON-ENGINEERING SECTIONS OF THE APPLICATION. HOW THE COMMISSION CAN COMPLY WITH BECHTEL AND STILL AWARD LICENSES THAT SERVE IN THE PUBLIC INTEREST.

IN FINDING THAT INTEGRATION OF OWNERSHIP DID NOT CLEARLY DEMONSTRATE AN APPLICANT BETTER QUALIFIED TO SERVE THE COMMUNITY THE COURT OF APPEALS HIT AT THE VERY ROOT OF MOST OF THE PROBLEMS WITH THE COMPARATIVE PROCESS AS IT STOOD. THERE SIMPLY IS NO WAY MOST OF THE CRITERIA USED IN THE PAST COULD PREDICT WITH ANY RELIABILITY SERVICE TO A COMMUNITY WITH ONE LONE EXCEPTION. THE DAYTIMER PREFERENCE AWARDED A PREFERENCE TO AN APPLICANT THAT HAD OWNED AND OPERATED A DAYTIME ONLY FACILITY LICENSED TO THE SAME COMMUNITY FOR A PERIOD OF THREE YEARS PRIOR TO THE DESIGNATION FOR HEARING OF THE NEW FM FACILITY. THIS PREFERENCE RECOGNIZED AMONG OTHERS THE PAST SERVICE IN THE SAME COMMUNITY. WHILE INTEGRATION OF OWNERSHIP WAS A PART OF THE DAYTIMER PREFERENCE IT SHOWED THAT AN APPLICANT HAD SERVED IN THE COMMUNITY IN THE PUBLIC INTEREST, IT WAS LIKELY THAT IT WOULD DO SO IN THE FUTURE.

THE FACT THAT THE APPLICANT WOULD HAVE OPERATED THE DAYTIME ONLY AM FACILITY FOR A PERIOD OF THREE YEARS DEMONSTRATED THAT THE APPLICANT WAS NOT A SPECULATOR, SEEKING A GRANT TO RESELL. IT ALSO REWARDED A LICENSEE FOR OPERATING A LIMITED FACILITY ACCORDING TO THE RULES SERVING THE COMMUNITY. OTHER APPLICANTS HAVE NO HISTORY IN THE COMMUNITY TO BE JUDGED BY OR PAST HISTORY OF COMPLIANCE WITH COMMISSION RULES TO BE JUDGED BY.

TO COMPLY WITH BECHTEL AND STILL AWARD LICENSES IN COMPARATIVE CASES THE COMMISSION MUST RELY ON PAST HISTORY OF APPLICANTS. TO RELY ON ANYTHING BUT ACTUAL HISTORY CANNOT BE BASED ON ACTUAL SERVICE, BUT ON MERE SPECULATION.

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THE IMPACT OF BECHTEL ON OTHER COMPARATIVE ISSUES

THE CHALLENGE OF THE BECHTEL CASE WAS NOT SIMPLY A CHALLENGE OF THE CREDIT GIVEN IN THE PAST FOR INTEGRATION OF OWNERSHIP IN AN APPLICANT, IT WAS A DIRECT CHALLENGE TO THE COMMISSION'S USE OF ANY CRITERIA THAT CANNOT BE SHOWN TO RESULT IN A BETTER SERVICE OR APPLICANT BEING GRANTED AS A RESULT OF THE PREFERENCE. GIVEN THAT ABSENT AN ACTUAL HISTORY NO APPLICANT CAN REALLY BE JUDGED. THEREFORE ONLY CRITERIA THAT ARE BASED ON PREVIOUS HISTORY CAN LIKELY WITHSTAND SIMILAR REVIEW. FOR EXAMPLE:

A) LOCAL RESIDENCE AND COMMUNITY INVOLVEMENT. IF AN APPLICANT HAS RESIDED IN THE COMMUNITY AND BEEN A PART OF THE COMMUNITY AS THE LICENSEE OF A BROADCAST FACILITY THEY WOULD HAVE A HISTORY OF LOCAL RESIDENCE AND COMMUNITY INVOLVEMENT. THIS IS A TANGIBLE DIFFERENCE FROM SOMEONE WITHOUT SUCH HISTORY THAT SIMPLY PROPOSES TO MOVE TO THE COMMUNITY. A LICENSEE THAT IS A RESIDENT AND INVOLVED IN THE COMMUNITY WILL BE MORE ATTUNED TO THE COMMUNITY'S NEEDS AND PROBLEMS THAN A NON-RESIDENT. THIS APPLIES TO LICENSEES WHO ARE INTEGRATED OR NOT INTEGRATED.

B) DAYTIMER PREFERENCE. LICENSEES OF DAYTIME AM STATIONS HAVE SHOWN THEIR INVOLVEMENT TO THE COMMUNITY, THROUGH PREVIOUS SERVICE IN THE ACTUAL COMMUNITY APPLIED FOR. THEY HAVE ALSO SHOWN THEIR ABILITY TO OPERATE WITHIN THE RULES AND REGULATIONS WHILE DOING SO WITH A LIMITED FACILITY.

THEIR HISTORY OF SERVICE SHOULD BE AWARDED A PREFERENCE. TO NOT CONTINUE THE DAYTIMER PREFERENCE WILL CERTAINLY RESULT IN MORE DAYTIME AM'S GOING DARK THROUGH INCREASED COMPETITION EVEN THOUGH THEY HAVE SERVED THEIR COMMUNITIES IN THE PAST.

C) BROADCAST EXPERIENCE. WHILE NO LONGER BEING REQUIRED TO BE INTEGRATED INTO THE DAY TO DAY OPERATION, IT CANNOT BE DISPUTED THAT AN EXPERIENCED BROADCASTER KNOWS MORE ABOUT THE OPERATION THAN A NON-EXPERIENCED BROADCASTER. THIS PREFERENCE MOST CERTAINLY CAN SHOW A BETTER SERVICE TO THE COMMUNITY.

D) MINORITY PREFERENCE. THIS IS PERHAPS THE MOST DIFFICULT CRITERIA TO JUSTIFY IN LIGHT OF BECHTEL. TO AWARD A BLANKET PREFERENCE DUE TO MINORITY STATUS WOULD NOT LIKELY STAND BEFORE A SERIOUS CHALLENGE. THIS PREFERENCE SHOULD BE AWARDED TO THE EXTENT THE MINORITY POPULATION OF THE PROPOSED COMMUNITY IS UNDERREPRESENTED IN BROADCAST OWNERSHIP. FOR EXAMPLE IF AN AMERICAN INDIAN APPLICANT IS GIVEN A PREFERENCE IN A COMMUNITY WHERE THERE IS A SUBSTANTIAL AFRICAN-AMERICAN OR HISPANIC POPULATION IT CANNOT BE DEFENDED THAT THE AMERICAN INDIAN APPLICANT WILL RESULT IN BETTER SERVICE. ON THE OTHER HAND IF A COMMUNITY HAS A MEASURABLE HISPANIC POPULATION OF TEN PER CENT AND THE OWNERSHIP OF THE OTHER BROADCAST STATIONS IN THE MARKET HAS GREATER THAN TEN PER CENT HISPANIC IS THERE REALLY A BENEFIT IN AWARDING A PREFERENCE? I DON'T THINK SO AND DON'T BELIEVE THE COURT OF APPEALS WOULD EITHER.

A MINORITY PREFERENCE SHOULD BE AWARDED ONLY AFTER IT IS SHOWN THAT OWNERSHIP OF BROADCAST FACILITIES IN THE PROPOSED COMMUNITY IS NOT IN PROPORTION TO THE MINORITY POPULATION IN THAT SAME COMMUNITY. THE FIRST TEST SHOULD BE THE BREAKDOWN OF THE MINORITY POPULATION AND THEN A MINORITY PREFERENCE SHOULD ONLY OCCUR AND ONLY TO THE EXTENT THAT THAT MINORITY IS UNDERREPRESENTED IN BROADCAST OWNERSHIP LESS THAT IT'S PERCENTAGE OF POPULATION.

ADDITIONAL CRITERIA THAT SHOULD BE USED

THE MOST NEGLECTED AREA USED TO JUDGE COMPARATIVE APPLICANTS IN THE PAST HAS BEEN THE LEVEL OF COMMITMENT TO THE PROPOSAL. ALL TOO OFTEN ONE PARTY SEARCHES FOR AND PROPOSES A CHANNEL THROUGH RULEMAKING, CONTINUES THROUGH ADDITIONAL FILINGS TO SEEK THE ALLOCATION OF A NEW CHANNEL AND THEN AFTER THE CHANNEL IS ALLOCATED FACES APPLICANTS THAT COME OUT OF THE CLOSET. CONSULTING ENGINEERS AND COMMUNICATIONS ATTORNEYS WHO SEND BULK MAILERS ENCOURAGING APPLICANTS TO SEEK A NEW ALLOCATION SIMPLY OVERLOAD THE SYSTEM. IF THOSE APPLICANTS WERE TRULY INTERESTED IN SERVING THE COMMUNITY WHERE WERE THEY WHEN THE CHANNEL HAD NOT BEEN ALLOCATED. A STRONG ALMOST OVERWHELMING FINDERS PREFERENCE OR PIONEER PREFERENCE SHOULD BE AWARDED TO THE PARTY WHO GOES THROUGH THE STEPS OF ALLOCATING A NEW CHANNEL OR SERVICE. UNLESS THAT APPLICANT IS UNFIT THEY SHOULD BE AWARDED A MAJOR PREFERENCE. THIS WOULD ALSO CUT DOWN ON SPECULATIVE APPLICATIONS. THIS MIGHT RESULT IN A SHORT TERM INCREASE IN RULEMAKINGS, BUT A LONG TERM REDUCTION IN SPECULATIVE APPLICATIONS. A FINDERS PREFERENCE SHOULD BE TIED TO OPERATION OF THE FACILITY FOR A PERIOD OF TIME, PERHAPS THREE YEARS TO AGAIN PREVENT SPECULATION. FEW APPLICANTS WILL SEEK A FACILITY THEY MUST BUILD AND OPERATE FOR THREE YEARS UNLESS THEY ARE SERIOUS ABOUT OPERATING THE FACILITY.

ANY TRANSFER OF THE FACILITY SHORT OF THREE YEARS SHOULD BE RESTRICTED UNLESS A LEGITIMATE REASON CAN BE PROVED. FOR EXAMPLE A DEATH, BANKRUPTCY, DIVORCE OR OTHER REASON. SHORT OF THAT, IF AN APPLICANT GETS A GRANT OF A NEW FACILITY AND DOESN'T WANT TO CONTINUE, THE LICENSE SHOULD BE SURRENDERED AND AVAILABLE FOR OTHER APPLICANTS.

ANOTHER MAJOR POINT TO CONSIDER IS WHAT TO DO WITH VACANT ALLOCATIONS. IN TOO MANY CASES A CHANNEL WILL BE ALLOCATED, APPLIED FOR, APPLICATION GRANTED AND THEN NOT BUILT. WHEN THE CONSTRUCTION PERMIT EXPIRES THE CHANNEL IS STILL THERE FOR THE PROCESS TO BEGIN ALL OVER AGAIN. A MUCH BETTER WAY WOULD BE TO REQUIRE A BOND WITH THE ISSUANCE OF A CONSTRUCTION PERMIT TO BE REFUNDED AFTER THE FACILITY IS LICENSED. IF A CONSTRUCTION PERMIT EXPIRES THE CHANNEL WOULD THEN BE DELETED AND THE BAND WOULD BE CLEARED OF UNUSED ALLOCATIONS ALLOWING FOR MORE EFFICIENT USE.

CONCLUSIONS

IN THE BECHTEL DECISION, THE COURT OF APPEALS WAS TELLING THE COMMISSION THAT UNLESS THERE IS A DEMONSTRATABLE REASON FOR A PREFERENCE, IT SHOULD NOT EXIST. THIS GIVES THE COMMISSION AN OPPORTUNITY TO SOLVE THE IMMEDIATE PROBLEM, BUT CLEAN UP A PROCESS THAT HAS LED TO SUBSTANTIAL ABUSES OVER THE YEARS.

A SIMPLE PROCESS AS OUTLINED ABOVE, WITH A CLEARLY DEFINED POINT SYSTEM, WITH DEADLINES AND HARD RESTRICTIONS ON SETTLEMENTS CAN GO A LONG WAY TO CLEAN UP THE PROCESS.

AWARDING PREFERENCE POINTS BASED ON 1) FINDING THE ALLOCATION AND SEEKING ITS ALLOCATION, 2) PREVIOUS LOCAL RESIDENCE AND COMMUNITY INVOLVEMENT, 3) PREVIOUS BROADCAST EXPERIENCE THAT RELATES TO THE PROPOSED SERVICE, 4) A MAJOR PREFERENCE TO DAYTIME AM'S, AND 5) A MODIFIED MINORITY PREFERENCE TO BE WEIGHTED TO THE MINORITY POPULATION AND MINORITY BROADCAST OWNERSHIP IN THE PROPOSED COMMUNITY.

TAKING THESE STEPS CAN CLEAN UP THE PROCESS, SPEED TRUE APPLICANTS IN PROVIDING SERVICE TO THE COMMUNITY, AND DETER THOSE APPLICATION MILLS AND APPLICANTS SPECULATING ON A NEW FACILITY FOR A QUICK SETTLEMENT OR QUICK SALE.

TAKING THESE STEPS WILL ALSO RESULT IN A DEFENDABLE METHOD OF DECIDING COMPARATIVE CASES THAT WILL RESULT IN FEWER APPEALS, FURTHER SLOWING THE PROCESS.

THESE COMMENTS ARE FILED BY JEM BROADCASTING COMPANY,
INCORPORATED. SHOULD THERE BE ANY QUESTIONS IN CONNECTION
WITH THE ENCLOSED OR REPLY COMMENTS, PLEASE ADDRESS THOSE
COMMENTS TO:

ELVIS MOODY, PRESIDENT
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216 NORTH MAIN STREET
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